

Innes & Hope

March 4. 1766.

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Chalmers

A N S W E R S

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CHRISTIANA CHALMERS in Walls,

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The PETITION of Mess. Innes and Hope merchants in London.

THE respondent had a son who died some years ago aboard his Majesty's ship the Rainbow, and who had due to him, at the time of his death, of prize-money and wages, the sum of L. 24 Sterling, after all expences in recovering the same were deducted. The respondent being advised, that by the law of England, she had undoubted right to this sum as executrix to her deceased son, she applied to James Young merchant in Stromness, to advise her what way she might recover the same; who informed her, that the proper method was, to execute a power of attorney to some person of character residing at London, and recommended Mess. Innes and Hope merchants there, as persons he had often dealt with, and extremely proper for executing such a commission. The respondent accordingly, upon his recommendation, made out a power of attorney in name of Mess. Innes and Hope, which she delivered to Mr Young, to be forwarded to them.

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Oct. 9. 1752.

Of this date, the petitioners wrote to Mr Robert Laing at Kirkwall, desiring him to inform the respondent, that they had received the above sum, and had placed it to the credit of James Young.

June 12. 1764.

The respondent made repeated demands upon Mr Young for the money; who denied that he had any concern with it; which obliged her to raise an action against him before your Lordships for recovery of the same; and to which Mr Young gave in the following defences: *1mo*, That as he never had been employed by the pursuer, it was impossible he could receive or intromit with the money now in question; and that he therefore apprehended no principle in law or equity could authorise any action against him for payment of it.

2do, That as he had only barely recommended Mess. Innes and Hope, when his advice was solicited by the pursuer, that recommendation alone could never make him liable for their intromissions: That she had it in her power either to accept or reject that advice when given; and that he could have no interest to urge the pursuer to grant such a commission to these persons in particular.

3tio, That he denied he was debtor at that time, or ever since, to Mess. Innes and Hope in any sum whatever. So that any pretence of compensation of this money with a debt due by him, must be entirely affected. He acknowledged, That he had been formerly bound to them in a bill of bottomry, with other two persons, for the sum of L. 106, 8 s. Sterling; but that this bill had been sent to Mr Robert Laing at Kirkwall, to be negotiated by him; and was accordingly soon after paid. And although Mess. Innes and Hope had given them a charge of horning for payment of the sum in this bill; yet they had obtained a suspension thereof, which the chargers had allowed to lie over for four years; which plainly showed how ill founded even they themselves apprehended their claim was. That therefore the decerning against him in this action was

was in effect discussing the above suspension, as to part of the sum charged for.

These defences appeared so relevant to the Lord Gardenston Ordinary, that his Lordship was pleased to sist process, till June 14. 1765. Mess. Innes and Hope should be brought into the field; and the respondent was accordingly obliged to raise a new action against the present petitioners.

After these two actions were conjoined, and a long litigation carried on before the Lord Ordinary, with which it is needless to trouble your Lordships, the Lord Ordinary, of this date, was pleased to pronounce the following interlocu-Feb. 20. 1766. tor. "The Lord Ordinary having considered this representation, and former procedure; and particularly having considered, that the pursuer's power of attorney was a direct commission to the representers to levy her son's wages, which commission they accepted of upon the recommendation of Young; therefore finds, That the representers are accountable to the pursuer, adheres to the former interlocutor, and refuses the desire of the representation; without prejudice to the representers to claim a full indemnification from Young, in case they shall make it appear, on accounting with him, that he was in cash to pay their demand."

Against this interlocutor the defenders have thought proper to give in to your Lordships a reclaiming petition; which the respondent shall endeavour to answer with all possible brevity.

The petitioners set out with an apology for persons in their situation troubling your Lordships with a cause concerning so trifling a sum as the present, but hope they will be excused for reclaiming against the Lord Ordinary's interlocutor, as they apprehend the doctrine there laid down would be of the most fatal consequences to commerce in general, and to the petitioners in particular.

Whatever may be the defenders particular circumstances, the pursuer is entirely ignorant of; but she apprehends the

Lord Ordinary's interlocutor is well founded both in law and public utility; and that if every person who recommended another in the way of trade, was to be liable for all the intrusions of the person he thus recommended, the consequences to commerce would be much more fatal than those arising from the present doctrine.

But whatever consequential interest the commercial world may have in the present dispute, the respondent must confess, that, even in that view, she cannot think herself a proper object for carrying on a long litigation with persons in the opulent circumstances in which the present defenders are, as she is an old cottar-woman, in a very indigent situation, unhappily cut off by the death of her son, from the only prospect she had of sustenance, and who has now nothing else to depend upon for support, except the small sum of money in question, which the defenders have already deprived her the use of for several years.

The defences offered on the part of the petitioners may be shortly reduced to these two. *1mo*, That as they were entirely ignorant of the pursuer's situation, they never would have thought of intrusting her, had not they understood that Mr Young was primarily liable. *2do*, That as Mr Young was the person to whom she gave the commission to receive the money, he alone was answerable to her for it.

With respect to the *first* of these, the respondent must confess she is entirely at a loss to discover what possible risk the defenders could run in uplifting her money, as they were to reimburse themselves out of what they recovered, and actually did so before they acknowledged the receipt of it. Had they proposed to remit the money immediately to the respondent, and afterwards taken their chance in recovering the same in virtue of the power of attorney, they might very properly have applied to Mr Young, or some other person of character, to have become caution for her; but as they were to remit
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her no money until they had recovered her own, they could not possibly run the smallest hazard.

But to come to the principal defence offered by the petitioners, they alledge, That they had no concern whatever with the pursuer in this cause, any more than their having recovered the money in question, in virtue of a power of attorney granted in her name; but as James Young had transmitted the power of attorney to them, to him alone they were accountable for it, and not to the pursuer.

In order to enforce this doctrine, they appeal to the determination of the Civil law, where it is laid down, That the *actio mandati directa* was only competent against that mandatarary who received the commission from the original mandant. But it was never granted against a second mandatarary, whose power was only derived from the first.

The pursuer, say they, in this case is the original mandant, and in that character is well intitled to call Young to account, who was her proper mandatarary. But it is not easily to be conceived upon what grounds she has any title to insist against the petitioners, who never received any commission from her.

The respondent readily acknowledges, that the above principle of the Civil law is extremely just and rational; but begs leave to draw a very different conclusion from it, *viz.* That as the respondent is the original mandant, she is well intitled to call, not Mr Young, but Mess. Innes and Hope, to account, in whose name the power of attorney was taken out, who received the commission directly from her, who are therefore her proper mandataries, and consequently alone liable to her for their intromissions. The pursuer's whole arguments are therefore built entirely upon a false foundation, That they received their powers from Mr Young, and not from the respondent; which is a proposition that will not bear even the least shadow of dispute.

But even supposing Mr Young had been actually their debtor at that time, which Mr Young contends he was not, the
respondent

respondent submits to your Lordships, upon what foundation or principle in law the defenders could compensate this money which was due to the respondent, with a debt owing to them by a third party.

Had the petitioners *bona fide* actually remitted the respondent's money to Mr Young on her account, they might have had some pretence for pleading the general doctrine, That they could not be again liable to pay to the respondent. And indeed they would not have had occasion to plead it, because if Mr Young had truly received the money for her behoof, he could have had no defence against paying the same to her; and as she had much easier access to recover the money from him, who is sponfible, and lives in her neighbourhood, the respondent would not have been put to the necessity of calling Mess. Innes and Hope in this action. But in the present question it is not even necessary for the respondent to dispute the general doctrine, as it does not apply to her case.

Upon the whole, then, the respondent flatters herself your Lordships will have no difficulty in adhering to the Lord Ordinary's interlocutor; and as she has been for several years so unjustly denied access to this sum, and put to a considerable expence which her low circumstances could ill afford, she hopes your Lordships will find her intitled to the interest of the above sum from the time the defenders recovered it, and likewise to her full expences.

In respect whereof, &c.

WILL. OLIVER.

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